Supreme Court of the United States

October Term, 1969

No. 305

UNITED STATES OF AMERICA,
Appellant,

v.

JOHN HEFFRON SISSON, JR.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

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The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union with the consent, filed with this Court, of both parties.

The American Ethical Union is a federation of all the Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the

"Ethical Culture Movement." The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of humanist groups and Ethical Culture Societies.

Ethical Culture has been recognized as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso* v. *Watkins,* 367 U. S. 488, 495, n. 11 (1961). Ethical Culture has no fixed creed or dogma, and requires no particular theological beliefs of its members.

> Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such questions.
>
> In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind. [*Do You Know the Ethical Movement?,* pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N.Y. p. 3]

The issues in this case and in the companion case of *Welsh* v. *United States,* No. 76, October Term 1969, are matters of serious concern to the American Ethical Union. Ethical Culture is founded on what is thought to be the ethical component of man—i.e., his conscience. Today the conscience of many (particularly young people) is deeply affected by the radical changes in warfare of the atomic age. The generation now subject to the draft has lived its entire life in a world which may be annihilated at any

moment. Many who volunteered in World Wars I and II might not be able conscientiously to participate at all in war where atomic weapons would be used. Others add to their moral condemnation of the present war the fear that atomic weapons might increase its random destruction.

Some members of Ethical Culture Societies are today serving in the Armed Forces; others are affiliated with the Fellowship of Ethical Pacifists, which opposes participation in all wars, and some would object to participation in the present war but not necessarily to participation in all wars. This is consistent with a fundamental tenet of Ethical Culture that each individual is ultimately responsible for his own actions and is required to make his own moral and ethical decisions. We submit that the situation of a member of an Ethical Culture Society conscientiously unable to participate in the Vietnam war is not dissimilar to the position recently recognized by the District Court for the Northern District of California in *United States* v. *Bowen* (Cr. No. 42499, decided December 24, 1969), a case involving a practicing Catholic. The Court stated in holding Bowen constitutionally entitled to exemption:

> According to the Catholic doctrine, as Bowen understands it, there are just and unjust wars. This Catholic doctrine, to which Bowen sincerely deems himself bound by his religion, sets out certain standards according to which each Catholic is to determine for himself whether a war is just. If he determines it is unjust, a Catholic must not participate in it. To do so would be to violate his religion. After instruction and study in this doctrine, Bowen concluded that it would violate his religion and his conscience to participate in the Vietnam war. (Opinion, at 2-3).

Moreover, the conscientious objection to participation in war of objectors who do not claim "religion" as the source of their objection may be founded on precisely the same considerations as those which lead some members of Ethical Societies to decide they cannot conscientiously participate. We know of no way in which a rational distinction can be made between the man who reaches his decision alone, on the basis of his solitary reading and contemplation, and the man who reaches his decision after participation in the affairs of an Ethical Society. Yet, on the reading of the statute proposed by the Government, one could be recognized as a conscientious objector influenced by "religious training and belief," and the other could be rejected as an objector expressing a "merely personal moral code."

ARGUMENT

POINT I

The First, Fifth and Ninth Amendments require that Section 6(j) of The Military Selective Service Act of 1967 be construed and applied to include Sisson's conscientious objection.

Sisson's conscientious objections constitute a sincere and meaningful belief which occupies a place in his life parallel to that filled by the orthodox belief in God in one who clearly qualifies for the exemption.

In *United States* v. *Seeger*, 380 U. S. 163 (1965) this Court decided, in order to avoid serious constitutional dif-

ficulties with the predecessor of the present statute, to include the views of Daniel Seeger within the definition of "religious training and belief." Seeger postulated "an ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense,' " 380 U. S. at 166. He concluded that "war, from the practical standpoint is futile and self-defeating, and that from the more important moral standpoint, it is unethical." *United States* v. *Seeger,* 326 F. 2d 846, 848 (2d Cir. 1964).

Here, John Heffron Sisson's "table of ultimate values" was characterized by the District Court as "moral and ethical," though not, by his own classification, "religious." *United States* v. *Sisson,* 297 F. Supp. 902, 905 (D. Mass. 1969).

To Sisson, the definition of immorality was that which is "contrary to my moral values and my ethics." A. 151. He testified:

> My moral values come from * * * religious writings, philosophical beliefs. [A. 152]

Sisson characterized the war in Vietnam (hence the reason why he refused induction) as being:

> [W]rong on every ground by which I could judge it, and to be immoral and to be illegal and to be unjust and unjustifiable in any way and because it went against my principles and my best sense of what was right. Therefore, I felt that by accepting induction that even though I might not be sent to Vietnam I would be consenting to the government's waging of war in Vietnam and I believed it my duty not to consent to this action because I did not consent in my own mind. [A. 151]

His affidavit in support of his motion to dismiss the indictment states:

> On the basis of my knowledge of that war, I could not participate in it without doing violence to the dictates of my conscience. [A. 43]

The District Court concluded that Sisson "was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." 297 F. Supp. at 905. Sisson's sincerity is conceded (Brief for the United States at 9, 41), just as was the case with Seeger. The District Court held that men such as Sisson could not be discriminated against because they do not label their belief "religious" where their objection to military service is motivated

> by profound moral beliefs which constitute the central convictions of their beings. 297 F. Supp. at 911.

We submit that the statute should be construed in accordance with Judge Wyzanski's observation, *Id.* at 909, that

> Duty once commonly appeared as the 'stern daughter of the voice of God.' Today, to many, she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy.

We urge this Court to accept that reasoning and, in line with its determination in *Seeger,* to construe the statute to require exemption of conscientious objectors who respond to "the stern voice of conscience" irrespective of its derivative source, recognizing, as did the Court below, that "[w]hat another derives from the discipline of a church,

Sisson derived from the discipline of conscience." *Id.* at 905. We think that construction is consistent with *Seeger,* and indeed could be said to be required by *Seeger.*

We believe the requirement that conscientious objection be based on "religious training and belief" cannot be applied to exclude a sincere conscientious objector without violating the required neutrality of the Government in matters of individual faith and belief, and thus raising insurmountable problems of establishment of religion. *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968); *Torcaso* v. *Watkins, supra,* at 495; *Everson* v. *Board of Education,* 330 U. S. 1, 15 (1947); *Koster* v. *Sharp,* 303 F. Supp. 837, 844-5 (E.D. Pa. 1969); *Goguen* v. *Clifford,* 304 F. Supp. 958, 961-2 (D. N.J. 1969).

It is evident that what is "religious" is largely a question of labeling. Tolstoy, in commenting on the case of a Dutch conscientious objector who refused to affirm a Christian basis for his objection but simply said that the commandment against killing was "rooted in human nature, in the mind of men," said:

> [H]e says he is not a Christian. But the motives of his refusal and action are Christian. He refuses because he does not wish to kill a brother man—because the commands of his conscience are more binding upon him than the command of man * * * Thereby he shows that Christianity is not a sect or creed which some may profess and others reject; but it is naught else than a life's following of that light of reason which illumines all men * * *
>
> Those men who now behave rightly and reasonably do so, not because they follow prescriptions of Christ, but because that line of action which was pointed out

eighteen hundred years ago has now become identified with human conscience. TOLSTOY, *The Beginning of the End* (1897), TOLSTOY ON CIVIL DISOBEDIENCE AND NONVIOLENCE 14 (1967).

This Court in *Seeger* emphasized that in determining an individual claim for conscientious objection, it is the sincerity and strength of the belief rather than the source which must be given primary recognition. 380 U.S. at 186. Yet, the form which an applicant for conscientious objection must fill out and submit to his local draft board contains questions concerning the origins of the applicant's beliefs. A. 231. An individual who states that he is non-religious and that his beliefs come from reading the great humanistic works of philosophers is dismissed as having a purely moral or philosophical code. An individual who reads current events as reported in the media and who believes that his military service could require him to inflict casualties on innocent civilians who happen to be in a "free fire zone" can reasonably conclude that his military service may involve violence to his conscientious scruples against the taking of life. Yet the likelihood is that he will be labeled a "political" objector and that his application for conscientious objector status will be denied. In short, any belief that does not square with a particular draft board's conception of religion can be and is labeled non-religious or political or a personal moral code.

We contend that it is not within the constitutional power of the government to involve itself in determining who the "religious" are. See *Presbyterian Church in United States* v. *Mary Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969).

The operation of Section 6(j) of the Act tends to place a premium not on the sincerity and strength of the applicant's beliefs and the extent to which his views play a role parallel to those of members of traditional churches but rather on his being a follower of court decisions who is able to restrict his answers to the magical phrases the decisions seem to require.

Any attempt to classify the deeply held moral convictions of conscience as lying outside of the sphere of the First Amendment must necessarily place the Government in the role of distinguishing beliefs and faiths—granting protection to some and withholding it from others. We submit that in order to avoid the constitutional issues raised by an interpretation of the "religious training and belief" clause which would exclude Sisson, this Court should construe the law so as to give full scope to the doctrine that religious freedom under the First Amendment cannot be restricted to orthodox beliefs. At the same time such a construction would avoid "an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 * * * [1954]." *United States* v. *Seeger, supra* at 188 (concurring opinion of Mr. Justice Douglas). See also *United States* v. *Bowen, supra.*

Philosophers, theologians and scholars have been no more successful than legislatures or courts in endeavoring to define religion or to distinguish a religious motivation from a conscientious scruple. Freedom of religion and freedom of conscience are terms which, in our constitutional history, have often been used interchangeably.

As Chief Justice Burger, writing for the Court of Appeals, said in *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127, 129 (D.C. Cir. 1957):

> Reference to standard sources of definitions discloses that the terms 'religion' and 'religious' in ordinary usage are not rigid concepts. Indeed, the definitions in these standard works taken together are by no means free from ambiguity. Some definitions would include only the Christian religion. Some call for belief in and worship of a divine ruling power or recognition of a supernatural power controlling man's destiny. But also included in these definitions is the idea of 'devotion to some principle, strict fidelity or faithfulness; conscientiousness, pious affecting or attachment.'

The Court of Appeals for the Eighth Circuit, in *United States* v. *Levy*, —— F. 2d —— (No. 19,507, Decided Dec. 8, 1969), pointed out that "[a]dmittedly the parallelism test of the *Seeger* case may significantly reduce the vitality of the personal moral code test, to the extent that pacifistic beliefs, if sincerely and deeply held may be defined as religious regardless of their source * * * Perhaps this is necessary to avoid constitutional objections * * *" (P. 14 of slipsheet opinion).

The Court went on to cite with approval the following comments:

> [I]s the product of one man's unaided reason superior to another's because he chooses to call it religion rather than *conscience or morality*? And if not, what ground can there be, other than a verbal one, for distinguishing one reasoned conclusion from another? It seems ironical to discriminate against those who share one of man's highest impulses—an unwillingness to take the life of his fellow man—because it springs from

reason, and not from the presumed command of some supernatural power. * * *

Separating one source of belief from another seems principally an exercise in conceptualism; certainly it is in the highest degree perplexing. No universally acceptable touchstone is known which enables one to separate religion from ethics or morals or philosophy, and the search for one is about as rewarding as efforts to square the circle. Brodie and Southerland, *Conscience, The Constitution, and the Supreme Court: The Riddle of United States* v. *Seeger*, 1966 Wis. L. Rev. 306, 329, 308.

Another question presented by the instant case is that of opposition "to participation in war in any form." Does this language compel the drafting of men like Sisson, whose conscientious sincerity is unquestioned? The District Court found such a result unconstitutional, and we agree. We think that result would violate the First, Fifth and Ninth Amendments to the Constitution, as discussed in Point II, *infra*. We suggest, however, that this is not an inevitable result, but one that can be avoided if the statutory language referring to "participation in war in any form" is construed and applied, as we submit it should be, to mean participation in any form in the war presently being fought.

"The test is not whether the registrant is opposed to all war, but whether he is opposed * * * to *participation* in war." *Sicurella* v. *United States*, 348 U. S. 385, 390 (1955). Thus the statute does not require opposition to every war or complete pacifism on the part of the individual. *Sicurella* v. *United States, supra; United States* v. *Geary*, 379 F. 2d 915, 920 (2d Cir.) *cert. den.*, 388 U. S. 959 (1967); *Taffs* v. *United States*, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. den.*

347 U. S. 928 (1954). The term "selective" objector is sometimes used as a pejorative for the objector who is said to wish to "pick and choose" his wars. But this is an unrealistic characterization. No individual is ever offered a number of wars in which he may wish to participate so that he may pick some and oppose others. By the same token no individual is actually faced with an opportunity to "select" a war for the purpose of objecting to it. Therefore, the statute should not be construed or applied to require hypothetical moral judgments on *all* wars. We believe, rather, that the statute is satisfied if there is an opposition derived from the dictates of conscience to any participation in the military based upon the realities of *this* war.

"Selective" conscientious objection does not necessarily mean an objection solely to the war in Vietnam.

> Clearly, the selective conscientious objector would also object to a war later in time but similar in all respects to the one under discussion. Thus, his objection is not based solely upon the expediency of a specific war but to all wars of that kind which he believes to be unjust. Cohen and Greenspan, *Conscientious Objection, Democratic Theory and the Constitution.* 29 U. PITT. L. REV. 289, 399 (1968).

Vietnam has been described by Robert McNamara, former Secretary of Defense, as "the kind of war we'll most likely be facing for the next 50 years," FINN (ed.), A CONFLICT OF LOYALTIES, xiii (1968). It is clear from the record that Sisson's objections would apply not only to this one particular war but equally to other wars which violate his deeply-held convictions regarding freedom and the sanctity of human life. A. 152.

The Government contends that "opposition to a particular war, no matter how sincerely and morally motivated, *necessarily* involves a political judgment" (Brief at 47, emphasis added). However, as the District Court observed:

> Nor was Sisson motivated by purely political considerations. Of course if 'political' means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not without some political aspects. 297 F. Supp. at 905.

We submit that under a broad construction of the statute, as in *Seeger*, Sisson's conscientious objection is entitled to recognition. Unless so construed, the statute violates the First, Fifth and Ninth Amendments.

POINT II

Conscientious objection to participation in war is an individual right protected by the First, Fifth and Ninth Amendments.

The Government concedes that the power of Congress granted by Article I, Section 8 of the Constitution to raise and maintain armies is limited by the Bill of Rights and that Congress, in conscripting persons for military service may neither "invidiously discriminate against any class or person" (Brief at 40) nor "act in a way which deprives a person of religious freedom or establishes a religion in violation of the First Amendment" (Brief at 43). We submit that the Congressional power is limited by and subject to the right of individual conscience under the Ninth as well as under the First and Fifth Amendments. See *United States v. Robel*, 389 U. S. 258, 264 (1967).

A. Our history confirms the right of conscience as a fundamental right reserved to the individual.

Jefferson struck the keynote of our historical tradition relative to the right of conscience when he said:

> [O]ur rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. JEFFERSON, *Notes on Virginia* (1782), THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 275 (Ed. Koch & Peden, Mod. Lib. 1944).

The reason for this, as Madison put it, is that these rights, in our Constitutional theory, are "unalienable," i.e. in such matters "no man's right is abridged by the institution of Civil Society." Madison, *Memorial and Remonstrance against Religious Assessments* (1785), appendix to *Everson* v. *Board of Education,* 330 U. S. 1, 63, 64 (1947). This view found its way into the Declaration of Rights of Virginia (1776)—"the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual". *Everson, supra* at 34 (dissenting opinion).

Thus, among the "great rights of mankind" submitted by James Madison to the First Congress was one which provided that "no person religiously scrupulous shall be compelled to render military service," 1 Annals of Congress (Gales and Seaton's Hist.) 451, Debate of June 8, 1789. The proposal reflected what was, even at that time, a longstanding American tradition. See Antieau, Carroll and Burke, RELIGION UNDER THE STATE CONSTITUTIONS 116 (1965); Conklin, *Conscientious Objector Provisions: A*

View in the Light of TORCASO v. WATKINS, 51 GEO. L. J. 252, 257-8 (1963); Cohen and Greenspan, *supra,* at 390-6. Indeed, the First Continental Congress had reaffirmed the right even in its darkest days. Resolution of July 18, 1775, cited in Conklin, *supra,* at 256-7.

The Congressional debates on these proposals are sparse. The outlines of the general argument are, however, clear. Hamilton, in THE FEDERALIST PAPERS, No. 84 (Rossiter ed. 1961) 513-4, felt that a Bill of Rights was superfluous to a government founded upon the consent of the people, especially a government established "to secure the blessings of liberty * * *." He found a positive "danger" in a Bill of Rights since they would "contain various exceptions to powers which were not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." *Ibid.* Jefferson's view prevailed "that a bill of rights is what the people are entitled to against every government on earth, general or particular * * *" (Letter to James Madison, December 20, 1787, JEFFERSON, *supra,* at 438).

The paring down of Madison's list led some to fear that the omission of any items proposed might create an inference that only the enumerated rights would be protected. Representative Boudinot of New Jersey, commenting on the proposal to exempt conscientious objectors from military service, declared not only that the clause was "necessary" but added his concern that "by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to

bear arms." I Annals of Congress 796, Debate of August 21, 1789.

It was to meet such objections that Madison proposed what became the Ninth Amendment. See I Annals of Congress 456, Debate of June 8, 1789; *Cf. Griswold* v. *Connecticut,* 381 U. S. 479, 488-90 (1965) (concurring opinion).

Sectarian pacifist groups believed that the Constitution *had* secured their permanent exemption from bearing arms. The view of the Society of Friends in 1795 was that the right was grounded in the Free Exercise Clause. SCHLISSEL (ed.), CONSCIENCE IN AMERICA 49 (1968). "A Memorial of the Society of People commonly called Shakers * * *" in 1810 contained this statement:

> In all free governments it is acknowledged as a self-evident truth, that the liberty of conscience is an inalienable right; consequently no human authority has a right to claim any jurisdiction over the conscience, either to control or interfere with its sacred requirements in any manner or under any pretence whatever.
>
> And it is well known that compulsion in matters of conscience is entirely contrary to those liberal principles laid down by those venerable patriots of freedom who formed and established the fundamental laws of our State and Nation.
>
> According to these well known and generally acknowledged principles of liberty, we are persuaded that nothing more can be required, than a *full proof of sincerity,* to entitle any individual or society of people to the full enjoyment of any principle of conscience which in its nature can do no moral injury to others. *Id.* at 73.

With this history and tradition as background, Congress undeviatingly, throughout our history, has enacted conscientious objector statutes in one form or another. See Conklin, *supra* at 259-60; *United States* v. *Seeger, supra* at 170-71.

When Congress, in the Selective Draft Act of 1917 (Act of May 18, 1917, ch. 15, §4, 40 Stat. 76, 78), attempted to narrow the exemption to persons affiliated with historic peace churches, President Wilson broadened it to include those "who object to participating in war because of conscientious scruples." Executive Order No. 2823, March 20, 1918. Harlan Fiske Stone (later Chief Justice Stone), writing on the conclusions reached by a World War I Board of Inquiry on conscientious objectors of which he was a member, observed:

> All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation in the hands of the State. * * * *
>
> While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be dissociated from what is commonly recognized as religious experience. Stone, *The Conscientious Objector,* 21 COLUM. U. QTLY. 253, 269, 263 (1919).

This history and tradition led Chief Justice Hughes to state, in *United States* v. *Macintosh,* 283 U. S. 605, 634 (1931) (dissenting opinion):

> [I]n the forum of conscience, duty to a moral power higher than the state has always been maintained.

Hughes (joined by Justices Brandeis, Holmes and Stone) observed:

> The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates of our government, and religious scruples have been recognized in draft acts * * * I agree with the statement in the opinion of the Circuit Court case that 'this Federal legislation is indicative of the actual operation of the principles of the Constitution, that a person with conscientious or religious scruples need not bear arms, although as a member of society he may be obliged to render services of a non-combatant nature.' *Id.* at 633.

When this Court, in *Girouard* v. *United States*, 328 U. S. 61 (1946), overruled the holding of *Macintosh, supra*, that conscientious objectors could on that account be denied naturalization, Mr. Justice Douglas pointed out:

> The struggle for religious liberty has through the centuries been an effort to accomodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. 328 U. S. at 68.

B. The Free Exercise Clause of the First Amendment requires that religious objectors be exempted from military service. The Establishment Clause requires that this exemption apply to all conscientious objectors.

If, as we submit, Sisson's conscience cannot be distinguished from Seeger's and is equally entitled to be considered "religious," the Free Exercise Clause of the First Amendment would be violated if Sisson's conscientious objection is not recognized. It is most important that we "not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles.*" *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 250 (1963) (concurring opinion of Mr. Justice Brennan). See also Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355, 1390 (1968); Brodie and Southerland, *supra*, 1966 WIS. L. REV. at 321; Stone, *supra* at 268.

Violation of the Free Exercise Clause "is predicated on coercion." *Schempp, supra* at 223. As no greater coercion than forcing a person to act—indeed to kill—in violation of his conscience can be imagined, it follows that the Government's attempt to make Sisson choose between the army and jail "invades the sphere of intellect and spirit which it is the purpose of the First Amendment * * * to reserve from all official control." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U. S. 624, 642 (1943). See White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 662 (1968).

We suggest that the fundamental Free Exercise obstacle to requiring Sisson to accept military conscription is not a matter of balancing but rather a matter of whether government can force a person to take part in a war, force him to kill other human beings, when his conscience, which stands in the place of another man's God, commands him not to do so. In *Barnette, supra,* this Court forbade the state from forcing school children to salute the flag in violation of the dictates of their religion. We believe the dictates of Sisson's conscience in this case demand no less.

If this Court concludes that Sisson's conscientious objection is not "by reason of religious training and belief" within the meaning of the statute, then we think it is impossible to avoid the conclusion that the statute contravenes the Establishment Clause of the First Amendment, by preferring "religious" conscientious objectors to non-religious conscientious objectors. As pointed out above the right of conscientious objectors not to be required to bear arms is a right recognized by the Framers of the Constitution as a right protected by the Bill of Rights. To condition that right upon the objector's being religious would violate the required Governmental neutrality between the religious and the non-religious by establishing and attaching a religious condition to the right of conscientious objection.

During its last term, this Court again reaffirmed the doctrine that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968). As the Court said in *Everson,*

supra at 15, the government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." Nor may the government "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso* v. *Watkins, supra* at 495.

Surely, if a non-"religious" person cannot be excluded from holding government office by reason of his failure to affirm belief in God, a non-"religious" person whose conscience impels objection to military service cannot be excluded from the class of those exempted from compulsory mlitary service. See Conklin, *supra* at 277.

These are matters which must be left for definition "to the conviction and conscience of every man." Madison, *Memorial and Remonstrance, supra,* in *Everson, supra* at 64. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones,* 13 Wall 679, 728 (1872). The resolution, therefore, can *only* be a personal one. It follows from this also that any effort legislatively to exclude "political" or "moral" judgments from the composition of an individual's conscience are on their face arbitrary and discriminatory. Thus to exclude Sisson because of the nature of his objection, we submit, constitutes an impermissible discrimination in favor of certain forms of religious belief over others, in violation of the Establishment Clause. See *Engel* v. *Vitale,* 370 U. S. 421 (1962); *Abington School District* v. *Schempp, supra.* Failure to allow the exemption on this basis would constitute "hostility, not neutrality." *Schempp, supra* at 299 (concurring opinion of Mr. Justice Brennan).

C. Failure to recognize Sisson's conscientious objection would violate a fundamental right of conscience protected by the Fifth and Ninth Amendments.

It is abundantly clear, both from the historical materials and from the very context of American democracy, that the right not to be forced to act in violation of conscience is among those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). This Court has long acknowledged that "the concept of liberty protects those personal rights that are fundamental and is not confined to the specific terms of the Bill of Rights." *Griswold* v. *Connecticut*, *supra* at 486 (concurring opinion). The scope of these rights "is one not of words, but of history and purposes." *Poe* v. *Ullman*, 367 U. S. 497, 542-3 (1961) (dissenting opinion of Mr. Justice Harlan). The rights are those "'which are * * * fundamental; which belong * * * to the citizens of all free governments,' * * * for 'the purposes [of securing] which men enter into society.'" *Id.* at 541. The fact that the Framers of the Constitution intended such a flexible view of "liberty" is given strong support by the addition of the Ninth Amendment. *Griswold*, *supra* at 493 (concurring opinion).

What we are concerned with here—the right not to be forced to act in violation of conscience—is as basic an individual right as any explicitly enumerated in the Constitution. It is part of the liberty guaranteed by the due process clause of the Fifth Amendment, or one of the reserved rights explicitly safeguarded by the Ninth Amendment. The entire constitutional framework is implicit with the recognition of such a right.

"Liberty" under the Fifth Amendment has been held to include rights far less vital to freedom than the right not to be forced to kill in violation of conscience: e.g., *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925).

Relying on the reservation of rights clause of the Ninth Amendment, Mr. Justices Goldberg and Brennan and Chief Justice Warren reached, in *Griswold,* the same result reached for the Court by Mr. Justice Douglas on the basis of a spectrum of rights and reached by Mr. Justice White and Mr. Justice Harlan on the basis of the Fifth Amendment.

We submit that there is a fundamental constitutional right of conscience—in the sense of freedom from being compelled to participate in war in violation of conscience, whether it be found in the Fifth Amendment, the penumbra emanating from the whole constitutional scheme, or in the reservation of rights guarantee of the Ninth Amendment.

As Chief Justice Stone wrote in 1919:

> However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience * * *
>
> That any considerable number of our citizens at a time when we were making our supreme national effort should defy our laws and refuse to participate in it is a serious matter; but the violation of the conscience of the individual by majority action is likewise a serious matter, * * * Stone, *supra,* at 268, 269.

As Professor Redlich put it in a recent address to the New York Society for Ethical Culture:

> "The kind of society we are is frequently reflected in the kinds of things we cannot compel a person to do. We do not compel a person to confess to a crime. We have long since abandoned the practice of compelling young men and women to marry—a practice still followed in parts of the world. We do not compel a person to work against his will. We do not compel a person to be an executioner. No government on earth —least of all a democratic government—has a right to compel violence and killing from its citizens, even in a just cause, unless the citizen consents." Redlich, "The Draft, Individual Conscience and the Right Not to Serve," *The Ethical Platform* 8, May 25, 1969.

To possess a right of conscience only in a mold authorized by the government is to have no right at all.

> [I]f the state rejects the claim of the selective conscientious objector it is in effect claiming the right to substitute collective moral or religious judgment for individual moral or religious judgment. In effect, the state would be deciding that the individual possesses the right to make only 'correct' moral judgments—'correct' as determined by the government or, perhaps, by majority vote. We believe that no American democratic state should or can claim the right to determine for one of its citizens which moral or religious judgments are correct and which are not, for, if the state does possess this right, is there any truly significant difference between democracy and totalitarianism. Cohen and Greenspan, *supra*, 29 U.PITT L. REV. at 401.

As the Court of Appeals for the Second Circuit said, in *United States* v. *Seeger*, 326 F. 2d 846, 854-855 (2d Cir. 1964):

> * * * the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage.

The Government asserts that such a reading of the Constitution "would be wholly destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process." Brief, p. 47. But the "integrity" of the democratic process is not undermined by the exercise of individual liberties, unless it can be said that such liberties exist only at the whim of the state or at the behest of the majority. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Bd. of Educ.* v. *Barnette, supra,* 319 U. S. at 638. The existence and exercise of these rights "may not be submitted to vote; they depend on the outcome of no elections." *Ibid.*

The Government's concern for "order," moreover, runs contrary to the well-accepted principle that "order cannot be secured through fear of punishment for its infraction." *Whitney* v. *California,* 274 U.S. 357, 375 (1927) (concurring opinion of Mr. Justice Brandeis). "Those who won our independence by revolution were not cowards * * *. They did not exalt order at the cost of liberty." *Id.* at 377.

Of course the functioning of government would be more "orderly" if there were no consciences to contend with—just as this would be the case were there no free speech or jury trial. But "order" cannot prevail over liberty, unless our scheme of government is to radically alter its fundamental premises. "That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment." *Abrams* v. *United States,* 250 U.S. 616, 630 (1919) (dissenting opinion of Mr. Justice Holmes). We agree that there is a risk of disorder; but, as this Court recently observed, "Our Constitution says we must take this risk * * *; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength * * *." *Tinker* v. *Des Moines Community School Dist.,* 393 U.S. 503, 508-9 (1969).

This Court cannot by any decision alter the conscience of John Sisson. We submit that the Government is required by the Constitution to respect it and is not permitted to violate it.

Conclusion

We submit that following the principle of statutory construction enunciated by this Court in *Seeger,* the Military Selective Service Act of 1967 should be so construed and applied as to include Sisson's conscientious scruples against participation in the Vietnam war; that unless the statute is so construed and applied, it is (a) an unconstitutional discrimination against non-religious objectors and adherents of liberal religious persuasions such as that represented by *Amicus,* in violation of both the Establishment

and Free Exercise clauses of the First Amendment; (b) an arbitrary, unreasonable and impermissible classification in violation of the Fifth Amendment; and (c) a violation of the right of conscience reserved to the individual citizen by the Fifth and Ninth Amendments.

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